No. 15-1445

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

TIMOTHY M. KELLEY, ET. AL.,
Plaintiffs-Appellants,

v.

FIDELITY MANAGEMENT TRUST COMPANY; FIDELITY MANAGEMENT & RESEARCH COMPANY; FIDELITY INVESTMENTS INSTITUTIONAL OPERATIONS COMPANY, INC.,
Defendants-Appellees.

On Appeal from the United States District Court
for the District of Massachusetts, Case No. 1:13-cv-10222-DJC

BRIEF FOR THE SECRETARY OF LABOR AS AMICUS CURIAE SUPPORTING PLAINTIFFS-APPELLANTS

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QUESTION PRESENTED

Whether Fidelity, as trustee to numerous defined contribution pension plans covered by the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 et seq., engaged in self-dealing in violation of 29 U.S.C. § 1106, or breached its duty of loyalty in violation of 29 U.S.C. § 1104, by retaining and/or distributing to non-plan entities float income that accrued during participant distributions, where the trust agreement does not expressly permit this retention or distribution and Fidelity did not disclose it during the negotiation of the trust agreement.

THE SECRETARY'S INTEREST

This appeal presents important ERISA issues concerning the responsibilities of plan fiduciaries with regard to float income. As the head of the federal agency with primary responsibility for Title I of ERISA, Secretary of Labor v. Fitzsimmons, 805 F.2d 682, 692-93 (7th Cir. 1986) (en banc), the Secretary of Labor has a strong interest in ensuring that fiduciaries and service providers openly and fully disclose and negotiate the terms of any float income that accrues from the administration of the plan and the use of plan assets. The Secretary also has an interest in defending his longstanding guidance concerning float income and ensuring that fiduciaries and service providers fulfill their duties regarding this income. See generally Field Assistance Bulletin 2002-3 (Nov. 5, 2002), available at http://www.dol.gov/ebsa/regs/fab2002-3.html; Letter from Robert Doyle to

Judith A. McCormick (Aug. 11, 1994), available at http://www.dol.gov/ebsa/regs/ILs/il081194.html; DOL Advisory Opinion 93–24A (Sept. 13, 1993), available at https://www.dol.gov/ebsa/programs/ori/advisory93/93-24a.htm.

STATEMENT OF THE CASE

A. Statutory Background

ERISA is a remedial statute that was enacted to "protect . . . interests of participants in employee benefit plans and their beneficiaries" by setting forth "standards of conduct, responsibility, and obligation for fiduciaries of plans." 29 U.S.C. § 1001(b). "The Act's legislative history indicates that the 'crucible of congressional concern was the misuse and mismanagement of plan assets,' particularly self-dealing by plan managers." Lowen v. Tower Asset Management, Inc., 829 F.2d 1209, 1213 (1987) (quoting Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 141 n. 8 (1985)).

ERISA "defines 'fiduciary' not in terms of formal trusteeship, but in functional terms of control and authority over the plan" and its assets. Mertens v. Hewitt Assocs., 508 U.S. 248, 262 (1993) (citation omitted). Thus, the statute provides that "a person is fiduciary with respect to a plan to the extent [that person] exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting

management or disposition of its assets." 29 U.S.C. § 1002(21)(A) (emphasis added).

ERISA imposes on plan fiduciaries the familiar trust-law duties of loyalty and prudence, which are among the "highest known to the law." Donovan v. Bierwirth, 680 F.2d 263, 272 n.8 (2d Cir. 1982). ERISA section 404 requires fiduciaries to act "solely in the interest of the participants and beneficiaries and . . . for the exclusive purpose of: (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan," as well as with the utmost prudence and care in their dealings with ERISA plans. 29 U.S.C. §§ 1104(a)(1)(A), (B) (emphasis added).

Congress supplemented the fiduciary duties in section 404 by providing in section 406 a "categorical bar to certain types of transactions that were regarded as likely to injure the plan." Reich v. Compton, 57 F.3d 270, 275 (3d Cir. 1995) (citing Commissioner of Internal Revenue v. Keystone Consolidated Indus., 508 U.S. 152 (1993); additional citations omitted). As relevant here, ERISA section 406(a)(1)(D) prohibits a plan fiduciary from causing the "plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect . . . (D) transfer to, or use by or for the benefit of a party in interest,[1] or any

[1] A "party in interest" encompasses numerous parties that have some relationship to the plan, including, as relevant here, the plan fiduciaries. 29 U.S.C. § 1002(14)(A).

assets of the plan." 29 U.S.C. § 1106(a)(1)(D) (emphasis added). And ERISA section 406(b)(1) prohibits a fiduciary from "deal[ing] with the assets of the plan in his own interest or for his own account." 29 U.S.C. § 1106(b)(1).

B. Factual Allegations[2]

Fidelity Management Trust Company ("Fidelity Trust") acts as the trustee for numerous defined contribution retirement plans covered by ERISA. Appendix on Appeal ("App.") 21. In a defined contribution plan, plan assets are placed in one or more investments, at the direction of the participants in participant-directed plans, and the participants are then entitled to the value of their own investment accounts rather than any specific benefit amount. See 29 U.S.C. § 1002(34). This suit challenges the practices of Fidelity Trust and two other affiliated Fidelity entities, Fidelity Investments Institutional Operations Company, Inc. ("FIIOC"), a recordkeeper, and Fidelity Management & Research Company ("FMRC"), an investment company, with respect to redemption float income, which is income earned when, at the request of a plan participant, Fidelity Trust redeems or sells shares in the plan participant's investment account (usually, mutual funds shares) and transfers the proceeds into interest-bearing accounts before distributing it to the participant.

[2] Because this case was disposed of by the district court at the motion-to-dismiss stage, we have taken the facts in the amended complaint as true, as this Court must. See Gargano v. Liberty Intern'l Underwriters, Inc., 572 F.3d 45, 48 (1st Cir. 2009).

Plaintiffs allege that, when an ERISA plan participant requested a distribution from his or her individual account in a Fidelity-managed plan during the relevant time period, the investment shares were sold and the proceeds were placed in a redemption bank account (allegedly owned by and registered to Fidelity Operations, although Fidelity disputes that it owned the accounts), then the funds were moved to an interest-bearing account, usually overnight, then moved again, usually the following day, back to the redemption bank account to pay the participant. App. 25 (¶ 33). For electronic disbursements, the participant generally was paid the next day (after generating interest in the overnight account); for checks, float income was generated until the check was cashed. Id. Rather than distributing the interest that accrued overnight or over several days – the float income – to the participant's plan or the participant, Fidelity Trust used the income first to pay taxes, if any, then bank fees associated with the float program that were operating expenses associated with the plan for which Fidelity Trust allegedly was responsible, and then allegedly credited the remainder of the interest to the underlying mutual funds (so that it benefited all fund investors, not just the participant's plan). App. 26 (¶¶ 36, 38, 59, 60).

Plaintiffs allege that all three Fidelity entities were plan fiduciaries. Fidelity Trust was a fiduciary of the plans because, as trustee, it had authority and control over plan assets and management, including the authority to dispose of plan assets

and to make distributions. App. 23 (¶27). FIIOC was a fiduciary because, as an agent for Fidelity Trust, it "established, managed and maintained" the redemption accounts, and used the interest income in these accounts to pay Fidelity Trust's bank fees and to credit the mutual funds with the remainder. Id. (¶28). FMRC was a fiduciary because it had control over the interest bearing accounts, which, according to plaintiffs, held plan assets, and exercised discretion in choosing how to invest these assets. Id. at 24 (¶ 29).

According to plaintiffs, the governing trust agreements said nothing about the existence of the float income. App. 22, 34. Instead, the trust agreements only identified and authorized three types of fees: "(1) an asset-based fee based on a percentage of plan assets held in a particular Plan investment, (2) an administrative fee that is a fixed dollar rate per plan participant (also known as a 'hard-dollar' payment), and (3) fees for individual participant services such as loans." App. 21.

C. Procedural Background

Plaintiffs, ERISA plan participants, filed a putative class action against Fidelity in February 2013. Addendum ("Add.") 4. After the district court consolidated four pending cases, plaintiffs filed a consolidated complaint, which they amended twice. In the operative complaint for purposes of this appeal (the "amended complaint"), plaintiffs allege that Fidelity violated its fiduciary duties, including the duty of loyalty, 29 U.S.C. § 1104(a)(1)(A), by using float income

generated during the redemption process to defray its own expenses, App. 26, 32 (¶¶ 36, 59), and by giving the float income to other Fidelity clients. App. 21, 26-27, 32 (¶¶ 38, 60, ¶ 24).

Fidelity moved to dismiss on numerous grounds, including that float income is not a plan asset, that Fidelity is not an ERISA fiduciary with regard to float, and that, even if the float income is a plan asset, Fidelity properly used float income for the benefit of the Plans to pay administrative fees accrued by third-party financial institutions. Add. 5.

The district court granted the motion to dismiss. Add. 6-16. The court focused on whether the float income is a plan asset. Add. 6 ("Plaintiffs' allegations rise and fall on the premise that float income is a plan asset."). The court noted that although ERISA contains no definition of "plan assets," the Department of Labor (DOL) has consistently stated that whether something is a plan asset depends on "ordinary notions of property rights under non-ERISA law." Add. 7 (internal quotation marks and citation omitted). The court determined that, as a matter of property law, the plans "do not own the underlying assets of the mutual fund in which they invest" and only have "a property interest in the shares of the mutual fund in which the participant has invested." Add. 7-9 (internal quotation marks omitted). The court concluded that, because Fidelity owns the accounts that generated float income, that income is not a plan asset and consequently there is no

violation of ERISA with regard to the float. Add. 6-14. In so holding, the district court relied on the Eighth Circuit's decision in Tussey v. ABB, Inc., 746 F.3d 327 (2014), cert. denied, 135 S. Ct. 477 (2014), which found that this same float practice did not violate ERISA. The court noted that DOL has issued guidance saying that retention of float income is prohibited self-dealing unless it is disclosed, but the court declined to give weight to that guidance because, according to the court, it "assumes that plan assets have been transferred into the trust accounts and that the plan assets are the source of the float income." Add. 11.

The court also concluded that Fidelity is not an ERISA fiduciary when it comes to the float practices. Add. 14. The court reasoned that because Fidelity has complied with plan documents in processing withdrawals from the plan, it fulfilled its fiduciary duties. Id. at 15. "As a result," the court said, "Fidelity was no longer acting as a fiduciary" when it engaged in the float practice at issue. Id. If the plans wanted to make Fidelity responsible to pay the float to them or their participants, the court reasoned that the onus was on them to negotiate for this arrangement. Id.

SUMMARY OF ARGUMENT

Fidelity Trust, a fiduciary to numerous defined contribution pension plans, engaged in prohibited self-dealing and acted disloyally by allegedly retaining float income generated from its administration of the plans and distributing such income

to non-plan entities, because it allegedly failed to disclose the existence of such income and Fidelity Trust's governing trust agreements did not expressly authorize it to retain such income or use it for non-plan purposes.

1. For 22 years, fiduciaries and service providers have been on notice that, in order to meet ERISA's requirements, they must fully disclose their float arrangements with ERISA-covered plans. Accordingly, the financial industry has adopted policies, procedures, and protections pursuant to the Secretary's longstanding and consistent guidance to ensure that the interests of ERISA-covered plans and their participants with respect to float income are protected. If this Court affirms the district court's conclusion that ERISA fiduciaries and service providers may retain undisclosed float income because the float accounts are not plan assets, the regulatory float regime that has governed the financial industry for over two decades risks being upended.

2. Based on the allegations in the amended complaint, Fidelity Trust violated its duties with respect to float income. As we read the operative complaint, it alleges that Fidelity Trust failed to comply with the Department's float guidance, and engaged in prohibited self-dealing and disloyal conduct by using float income that was generated from its disposition of plan assets during its fiduciary management of the plan in its own interest and for its own account. First, the complaint alleges that Fidelity Trust dealt with the disposition of the plans'

ownership interest in the mutual funds shares – the cash generated when Fidelity Trust sold the plan's mutual fund shares following a withdrawal request – in its own interest to generate float income that it did not distribute solely to the plans, but instead used to pay its own expenses and for other third-parties. Second, Fidelity Trust, and FIIOC as its agent, allegedly used its discretionary administrative authority to cause the plans to transfer the proceeds from the disposition of the mutual funds shares (plan assets) to float accounts for its own use and for the benefit of other Fidelity clients or funds. These are prohibited transactions under ERISA sections 406(a)(1)(D) and (b)(1) because Fidelity allegedly did not disclose the existence of the float, and the governing plan documents did not expressly authorize it to retain the float or use it for non-plan purposes. Fidelity also violated its strict duty of loyalty under ERISA section 404 by retaining the float to pay its own expenses and to benefit parties other than the plans, thereby failing to administer the plans solely in the interest of the participants and beneficiaries, and for the exclusive purpose of providing benefits to participants and beneficiaries and defraying reasonable plan expenses.

This is true whether or not the float accounts contain plan assets. Here, the mutual fund shares which Fidelity Trust allegedly used to generate the float income were indisputably plan assets. Section 406 prohibits a fiduciary from using plan assets during plan administration for self-dealing, which Fidelity has done

under the facts alleged because it used the proceeds from the mutual fund sales to generate income for itself and for third parties without authorization in the plan documents to do so. Likewise, the strict duty of loyalty in ERISA section 404 says nothing about plan assets, and thus does not require that the float accounts contain plan assets. Without regard to whether the float accounts were or contained plan assets, Fidelity Trust violated this loyalty provision because, in allegedly using the mutual fund plan shares to generate income for itself and third parties while processing plan distributions, Fidelity Trust did not act solely in the interest of the plan participants and beneficiaries to pay their benefits and defray reasonable expenses. The district court's holding to the contrary was in error.

3. The district court also clearly erred in holding that Fidelity Trust, the trustee to the plans at issue, was not a fiduciary with regard to the float income generated while it was making distributions to plan participants. Under ERISA's broad functional definition of fiduciary, Fidelity was a fiduciary with regard to its "disposition of [plan] assets," 29 U.S.C. § 1002(21)(A)(i) (emphasis added), when it redeemed or sold the plans' ownership interest in the mutual funds and transferred the proceeds to the interest-bearing float accounts. The district court's holding to the contrary makes no sense and, in fact, turns the fiduciaries' disclosure requirements on their head by saying that, if a plan trustee does not disclose in its

governing agreement that it will retain float income, it may administer the plan in a disloyal or self-serving way.

ARGUMENT

The amended complaint alleges that Fidelity Trust did not disclose the existence of float income, the parties did not negotiate or come to an agreement concerning float income, the trust agreements did not authorize Fidelity Trust's retention or diversion of float income, and Fidelity Trust did not provide the plans with sufficient information to understand this float income. Moreover, plaintiffs allege that, despite this lack of disclosure and agreement, Fidelity Trust exercised its administrative control over the redemption process and over the disposition of the plans' ownership interest in the mutual funds to generate float income and to pay itself and entities other than the plans from the float accounts. As we explain, these allegations sufficiently state claims that Fidelity Trust, a trustee to the plans, violated ERISA's prohibitions on self-dealing and its requirement that fiduciaries act with the utmost loyalty to plan participants and beneficiaries and for the sole purpose of paying plan benefits and defraying reasonable expenses.

A. ERISA Prohibits Fiduciaries From Using Undisclosed Float Income Obtained Through Plan Administration for any Purpose Other Than to Benefit the ERISA-Covered Plan

i. The Department's Float Guidance

The DOL has issued three pertinent guidance documents concerning fiduciary duties for float income. These documents all take the position that an ERISA fiduciary engages in prohibited self-dealing and acts disloyally when it retains float income, unless the fiduciary disclosed sufficient information to enable the plan to make an informed decision with respect to the float arrangement, the plan has reviewed and agreed to the arrangement, and the arrangement does not permit the fiduciary to affect the amount of its compensation.

In the first document, the DOL responded to a letter from the Tennessee Department of Financial Institutions, which requested guidance concerning whether a non-depository Tennessee bank committed prohibited transactions under ERISA when it engaged in a "common industry practice," whereby "banks acting as agents or trustees for employee benefit plans earn interest for their own account from the 'float' when a benefit check is written to a participant until the check is presented for payment." DOL Advisory Opinion 93-24A, at *1 (Sept. 13, 1993), available at https://www.dol.gov/ebsa/programs/ori/advisory93/93-24a.htm. The DOL determined that "based on the facts described above, where a fiduciary (e.g.

Trust Company) exercises discretion with regard to plan assets, its receipt of income from the 'float' on benefit checks under a repurchase agreement with a national bank in connection with the investment of such plan assets would result in a [prohibited] transaction described in ERISA section 406(b)(1)." Id.

In 1994, the DOL wrote a letter to a lawyer for the American Bankers Association to "clear up an apparent misunderstanding" concerning Advisory Opinion 93-24A expressed in an editorial by that organization. Letter from Robert Doyle to Judith A. McCormick (Aug. 11, 1994), available at http://www.dol.gov/ebsa/regs/ILs/il081194.html. In this letter, DOL stated that the prohibition on self-dealing with respect to float income was not limited to the specific facts described in Advisory Opinion 93-24A. The editorial had suggested that no prohibited transaction occurs when a fiduciary generates and keeps float income because the "amounts in such disbursement accounts may no longer be considered plan assets." Id. The DOL stated that the editorial "misses the fundamental principle," that "without regard to the status of the funds after they are placed in a disbursement or other account, a bank fiduciary's unilateral decision to handle plan assets in such a way as to benefit itself constitutes prohibited self-dealing." Id. The DOL also noted that "if a bank fiduciary has openly negotiated with an independent plan fiduciary to retain earnings on the float attributable to outstanding benefit checks as part of its overall compensation, then the bank's use

of the float would not be self-dealing because the bank would not be exercising its fiduciary authority or control for its own benefit." Id.

In 2002, the Department issued Field Assistance Bulletin 2002-3 (Nov. 5, 2002), available at http://www.dol.gov/ebsa/regs/fab2002-3.html. This document elaborates on the 1994 letter and provides additional guidance concerning the duties of fiduciaries and service providers with respect to float income. Specifically, the bulletin describes what a fiduciary needs "to consider in evaluating the reasonableness of an arrangement under which the service provider will be retaining 'float' and what information [] a service provider [is] required to disclose to plan fiduciaries with respect to such arrangements in order to avoid engaging in a prohibited transaction[.]" Id. at *1. The document then sets out steps that plan fiduciaries and service providers should take to ensure that float practices are adequately disclosed and reviewed.[3]

[3] The document lists three primary duties with respect to float income for plan fiduciaries, related to their responsibility for conducting a prudent and competent review of float income, and three primary duties for a service provider to a plan, primarily related to fully disclosing to plan fiduciaries how float income is to be earned. Specifically, a fiduciary is required to: (1) review comparable providers to determine for whom float is credited, (2) review the circumstances under which float is earned (such as the inclusion of time limits for earning float income), and (3) review sufficient information to evaluate float as part of the total compensation to be paid for the services rendered under the agreement. Id. Similarly, a service provider is required to: (1) disclose the specific circumstances under which float is earned and maintained, (2) establish and adhere to time frames with respect to depository and redemptive float, and (3) disclose the rate and manner by which float is earned. Id.

Thus, all of this guidance, which has governed plan fiduciaries and service providers for over two decades, states the position that a fiduciary engages in impermissible self-dealing when it retains redemption float income without first obtaining the permission of the plan. Moreover, the second letter makes clear that the analysis does not depend on whether the float income is a plan asset. Instead, as explained below, the relevant question is whether, in exercising its fiduciary duties in making plan distributions, the fiduciary used shares owned by the plan to create float income to benefit itself.

ii. The Amended Complaint Sufficiently Alleges that Fidelity Trust Engaged in Self-Dealing and Acted Disloyally With Regard to the Float Income

Based on the allegations in the operative complaint, Fidelity Trust violated its duties with respect to float income. As we read the complaint and plaintiffs' brief, they allege that Fidelity Trust, and FIIOC as its agent, used its discretionary administrative authority to cause the plans to transfer the cash proceeds from the disposition of the mutual funds shares (plan assets) into interest-bearing accounts and then used this float income to pay administrative fees for which it was responsible and then to benefit the mutual funds.[4] Plaintiffs' primary argument is

[4] The district court also seems to have understood the complaint this way. See App. 9 (noting that the complaint alleges that "[w]hen a withdrawal request is made, the mutual fund shares are redeemed and the proceeds are transferred to" accounts registered to Fidelity). In their brief in this Court, plaintiffs assert that "when Fidelity, as Trustee for the Plans, redeems the mutual fund shares . . . [t]he

that Fidelity engaged in prohibited self-dealing. Plaintiffs allege that Fidelity Trust dealt with the assets of the plans in its own interest and for its own account by defraying its own expenses via float income that was generated from its administration of the plans. App. 34 (¶¶ 70-71). The amended complaint specifically alleges that Fidelity Trust "(1) did not disclose the float income, (2) did not negotiate for extra compensation in the form of the float income, or provide the Plans with information sufficient to understand the Defendants' compensation, and (3) had discretion to use the float income to pay themselves excessive compensation." App. 34 (¶ 72). These allegations, if proven, establish that: (1) Fidelity Trust, as a fiduciary to the plans, "deal[t] with the assets of the plan[s] in [its] own interest or for [its] own accounts," 29 U.S.C. § 1106(b)(1); and that (2) Fidelity, as a fiduciary to the plans, caused the plans to engage in a transaction that it knew or should have known constituted a "direct or indirect" "transfer to, or use by or for the benefit of, a party in interest [i.e., Fidelity], of any assets of the plan[s]," 29 U.S.C. § 1106(a)(1)(D).

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registered investment company that issued the shares will deliver the cash redemption price the following day to Fidelity as Trustee of the Plan," and then Fidelity Trust (together with FIIOC, acting as Fidelity Trust's agent) transfers these cash proceeds to the interest bearing accounts, Corrected Brief of Plaintiffs-Appellants at 4. Based on these allegations, there is no relevance to the fact that the underlying assets of the mutual funds are not plan assets under ERISA sections 3(21)(B) and 401(b)(1), 29 U.S.C. §§ 1002(21)(B), 1101(b)(1). If the allegations were that the float income was earned directly by the mutual fund before the plan cashed out shares, then ERISA sections 3(21)(B) and 401(b)(1) would govern and there would be no prohibited transactions.

There is no dispute that the plans' ownership interest in the mutual funds (i.e., the mutual fund shares) constituted a plan asset, as the district court acknowledged. Add. 8-9 (the plan "has a property interest in the shares of the mutual fund in which the participant has invested") (internal quotation marks and citation omitted). Plaintiffs allege that Fidelity Trust, the plans' trustee, and FIIOC, the trustee's agent, unilaterally used their authority over the redemption process to earn undisclosed float for Fidelity and other Fidelity clients, rather than for the sole benefit of the plans to which they owed a duty of undivided loyalty, These allegations, if true, establish prohibited transactions under ERISA sections 406(a)(1)(D) and (b)(1), and it was incumbent upon Fidelity to demonstrate an applicable exemption, which, unsurprisingly, it did not do at the motion-to-dismiss stage.

ERISA also requires that a fiduciary act solely in the interest of the participants and beneficiaries, and for the exclusive purpose of providing benefits to participants and beneficiaries and defraying reasonable expenses of administering the plan. 29 U.S.C. § 1104(a)(1)(A). Under the facts alleged, Fidelity Trust did not do so. Plaintiffs have alleged that Fidelity Trust used float income generated through its administration of the plans to defray its own

expenses and to benefit other Fidelity clients and funds, not solely to benefit the plans themselves and to pay the plans' reasonable expenses.[5] App. 32 (¶¶ 59-60).

iii. The District Court Incorrectly Focused on Whether the Float Accounts and the Income Derived From Those Accounts Were Plan Assets

In granting the motion to dismiss, the district court held that, largely because the interest-bearing accounts were registered to Fidelity, the float accounts and the float income at issue in this case do not constitute plan assets. Add. 6-7.[6] The court reasoned that "[a]t base, Plaintiffs' allegations rise and fall on the premise that float income is a Plan asset." Add. 6. While plaintiffs incorrectly assert that the case turns on the float accounts and income being plan assets and erroneously

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[5] Fidelity Trust contests that it used the float for its own interests because, according to Fidelity, it did not retain any of the income, but instead used it to pay expenses for which the plans were responsible and distributed the rest to the mutual funds whose shares generated the income. Memorandum in Support of Defendants' Motion to Dismiss Plaintiffs' Second Amended Consolidated Complaint at 18. This was not the basis of the district court's decision, however. In any event, this is essentially a factual dispute about which the Secretary takes no position. The Secretary's argument is based solely on the facts alleged in the amended complaint.

[6] ERISA contains no general definition of "plan asset." John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank, 510 U.S. 86, 89 (1993). The courts and the DOL have consistently taken the view that the determination of plan asset status is rooted in "ordinary notions of property law." See Merrimon v. Unum Life Ins. Co. of Am., 758 F.3d 46, 56 (1st Cir. 2014), cert. denied, 135 S. Ct. 1182 (2015); DOL Advisory Opinion 93–14A, 1993 WL 188473, at *4 (May 5, 1993); DOL Advisory Opinion 94-31A (Sept. 9, 1994), available at http://www.dol.gov/ebsa/programs/ori/advisory94/94-31a.htm.

state that the DOL guidance has consistently taken the position that float income derived from plan distributions is a plan asset, see Brief for Plaintiffs-Appellants, at 14-15, in fact, the Secretary does not agree that this issue is dispositive.[7]

As the DOL explained in 1994, "without regard to the status of the funds after they are placed in a disbursement or other account, a bank fiduciary's unilateral decision to handle plan assets in such a way as to benefit itself constitutes prohibited self-dealing." Letter from Robert Doyle to Judith A. McCormick (Aug. 11, 1994) (emphasis added). See also DOL Advisory Opinion 93–24A (Sept. 13, 1993) (concluding that the general rules concerning the segregation of plan contributions from an employer's general assets "have no application to the question of whether a plan has an interest in an administrative account when plan assets are transferred to the account in support of an outstanding benefit check"). In other words, a fiduciary can breach its duties under ERISA even assuming the float income is not a plan asset because both section 406(a)(1)(D) and section 406(b)(1) prohibit a fiduciary, such as a trustee, from using plan assets for self-dealing. Fidelity Trust has done so under the facts alleged here because it used its authority over the process of redeeming the plans'

[7] If this Court determines that plaintiffs have waived any argument that Fidelity violated its duties even if the float itself is not a plan asset, the Secretary urges the Court to reserve the issue that we address in the brief, i.e., whether Fidelity, in the absence of an express agreement about float, has engaged in prohibited transactions and acted disloyally in administering the plan in a way that generates float income that is not fully credited to the plan and its participants.

shares in the mutual funds, which all agree are plan assets, to generate income for itself and for third parties.

The district court determined that there can be no fiduciary breach unless the float income is a plan asset. But the language of ERISA is not so narrow. Instead, the statute broadly prohibits any "indirect" use of plan assets to benefit itself, 29 U.S.C. § 1106(a)(1)(D), or any activities where a fiduciary "deal[s]" with plan assets "in [the fiduciary's] own interest or for his own account." 29 U.S.C. § 1106(b)(1). Here, regardless of whether the float accounts themselves held plan assets, Fidelity at a minimum indirectly used plan assets (the cash proceeds of the plans' mutual fund shares) to benefit itself and third parties and thus violated both provisions on the facts alleged.

Moreover, plaintiffs also alleged that Fidelity violated its fiduciary duty of loyalty. ERISA requires a fiduciary to "discharge his duties with respect to the plan solely in the interest of the participants and beneficiaries," and "for the exclusive purpose of (i) providing benefits to participants and beneficiaries; and (ii) defraying reasonable expenses of administering the plan." 29 U.S.C. § 1104(a)(1). This provision says nothing about plan assets and thus does not require that the float account be a plan asset to find a violation. Again, without regard to whether the interest-bearing accounts were or contained plan assets, Fidelity Trust violated this loyalty provision because, in allegedly using plan

shares to generate income for itself and third parties while processing plan distributions, Fidelity Trust did not act solely in the interest of the plan participants and beneficiaries to pay their benefits and defray reasonable expenses.

In holding to the contrary, the district court relied heavily on the Eighth Circuit's Tussey decision. Without mentioning the Secretary's float guidance or addressing the effect of non-disclosure, the Tussey court held that the same type of redemptive float was not a plan asset because the float accounts were owned by Fidelity for the beneficial interest of the underlying investment options, and, on this basis alone concluded that Fidelity did not breach any obligations with regard to the float. 746 F.3d at 339-40. By focusing on whether the float accounts are plan assets rather than whether the float was disclosed and agreed upon by the parties, the Eighth Circuit made the same error as the district court below.

The district court also relied on two recent First Circuit cases, Merrimon v. Unum Life Ins. Co. of Am., 758 F.3d 46 (1st Cir. 2014), and Vander Luitgaren v. Sun Life Assurance Co. of Canada, 765 F.3d 59 (1st Cir. 2014). These cases addressed whether life insurance proceeds retained by an insurance company constituted plan assets where the beneficiary was given a "checkbook" from the administering life insurance company, and earned a set rate of interest under plan terms until the amount of life insurance benefits was drawn down by the beneficiary. In both cases, this Court held that these retained assets did not

constitute plan assets, and thus, the interest earned on these assets (above the amount paid to the beneficiaries) did not belong to the plan. This Court correctly determined that, because the plan participants were sufficiently informed at the outset in plan documents that the life insurance benefits could be paid in this manner, and the plan participants therefore received what they had been promised, the arrangement did not run afoul of ERISA's self-dealing prohibitions. Merrimon, 758 F.3d at 56; Vander Luitgaren, 765 F.3d at 63.[8]

In contrast, in this case, plaintiffs allege that Fidelity Trust did not disclose its float practices and procedures and the parties did not agree to this. While Fidelity argues that the trust agreements essentially permitted it to process and approve withdrawals in whatever way it chose, see Add. 15, and the district court concluded that Fidelity acted in accordance with the trust agreements apparently by processing distributions in the manner and timeframes specified, Add. 15, there was no district court finding that Fidelity disclosed or openly negotiated its float program or that the trust agreements authorized such a float program. Instead, the

[8] The Secretary took this same position in an amicus curiae brief filed in response to an invitation from the Second Circuit in Faber v. Metro. Life Ins. Co., 648 F.3d 98 (2d Cir. 2011). There, the Secretary argued that the ERISA fiduciaries effectively discharged their ERISA duties under the plan when they furnished the beneficiaries with the checkbook as promised by the plan terms, and they did not retain plan assets by holding and managing the assets that backed the so-called "Total Control Account" (i.e., the retained asset account), Secretary of Labor's Amicus Curiae Letter Brief in Response to the Court's Invitation at 1, 5-6, http://www.dol.gov/sol/media/briefs/faber%28A%29-02-17-2011.pdf. The Second Circuit agreed. Faber, 648 F.3d at 106.

amended complaint alleges that Fidelity failed to disclose or negotiate the float program and the trust agreements do not expressly mention float, much less permit Fidelity to operate and maintain a float program. App. 22, 34.

Because the governing plan documents do not address float or permit Fidelity Trust to retain float income generated during plan distributions, this case is not governed by this Court's decisions in Merrimon or Vander Luitgaren. Instead, this Court's other retained asset decision, Mogel v. UNUM Life Ins. Co. Of Am., 547 F.3d 23, 26 (1st Cir. 2008), is much more on point. In Mogul, this Court held that plan participants stated a viable claim for fiduciary breach where an insurance company was not expressly permitted to retain and earn interest on life insurance proceeds, but instead was required to pay out the benefits in a lump sum. Id.

Similarly, the DOL's longstanding guidance explains why float income earned through plan administration may not be retained by a trustee or other fiduciary or plan service provider where the governing plan documents do not expressly authorize such a float program. See Field Assistance Bulletin Field Assistance Bulletin 2002-3 (plan fiduciaries and service providers must identify "the specific circumstances under which float will be earned and retained," and "when the float period commences . . . and ends," and the "rate of the float or the specific manner in which such rate will be determined"); Letter from Robert Doyle to Judith A. McCormick; DOL Advisory Opinion 93–24A. The district court erred

in distinguishing the DOL's guidance on the basis that the DOL simply "presume[d], however, the answer to the question at issue here – whether the funds in the Fidelity account are, in fact, 'plan assets.'" Add. 11. To the contrary, the DOL guidance did not rely on or answer that question and the district court's focus on whether the float accounts hold plan assets misses the point. Instead, the proper inquiry under the guidance is whether governing plan documents expressly permit float income generated through plan administration to be retained by a fiduciary or service provider. Here, because the governing plan documents allegedly do not expressly permit Fidelity to retain float income for itself or others, plaintiffs have stated a plausible claim for fiduciary breach.

The contrary argument ignores ERISA's protective purposes and the congressional intent that sections 406(a)(1)(D) and 406(b)(1) "should be read broadly in light of Congress' concern with the welfare of plan beneficiaries." Leigh v. Engle, 727 F.2d 113, 126 (7th Cir. 1984); see also Lowen v. Tower Asset Mgmt., Inc., 829 F.2d 1209, 1213 (2d Cir. 1987). The district court in this case did the exact opposite: it ignored Fidelity Trust's alleged disposition of plan assets and the fact that Fidelity Trust caused transactions that, at the very least, indirectly resulted in the use of plan assets for a party in interest. This was legal error. Not only does it interpret ERISA's remedial provisions too narrowly, it also disregards DOL's float guidance, which has protected plan participants for 22 years. There is

simply no compelling reason for the district court to exclusively focus on one moment in the float program in determining whether the float accounts contain plan assets, while completely ignoring Fidelity Trust's role in disposing of plan assets that ultimately generated the float income.

B. Fidelity Trust Acted as a Fiduciary With Respect to the Float Income

The district court's alternative holding that Fidelity Trust, a trustee to the Plans, was not a fiduciary with respect to float also fails on the same basis, since Fidelity Trust allegedly exercised discretion over plan assets outside the bounds of the plan documents, which did not expressly permit Fidelity's float program. See Add. 14-15 (relying on cases where the interest arrangement was disclosed); cf. Letter from Robert Doyle to Judith A. McCormick (Aug. 11, 1994) ("Of course, if a bank fiduciary has openly negotiated with an independent plan fiduciary to retain earnings on the float attributable to outstanding benefit checks as part of its overall compensation, then the bank's use of the float would not be self-dealing because the bank would not be exercising its fiduciary authority or control for its own benefit.").

Here, plaintiffs allege that Fidelity Trust is a trustee, App. 21-22 (¶¶ 22-23, 25), that it entered into agreements with the plans to hold plan assets, App. 21 (¶ 22), and that it had broad powers to invest, retain, sell, exchange or otherwise dispose of assets of the trust fund, App. 22-23 (¶¶ 25, 27-28). The district court

recognized that, "[i]n light of its authority to manage or dispose of Plan assets, [Fidelity] is a fiduciary of the Plans." Add. 3.[9] And the district court was correct in that respect, because any entity that exercises authority or control with respect to management or disposition of plan assets is a fiduciary. 29 U.S.C. § 1002(21)(A)(i).

Thus, Fidelity was a fiduciary with respect to the Plans' redemptions, including the accrual of float income because it allegedly "exercise[d] discretionary authority or discretionary responsibility in the administration of [the plans]" by directing and controlling, from start to finish, the process of the Plans' redemptions. 29 U.S.C. § 1002(21)(A)(iii). Moreover, Fidelity was a fiduciary because it "exercise[d] any authority or control respecting the management or disposition of [the plans'] assets" when Fidelity redeemed or sold the plans' ownership interest in the mutual fund investments and transferred cash to the interest-bearing float accounts. 29 U.S.C. § 1002(21)(A)(i) (emphasis added).

The district court nonetheless decided that Fidelity Trust was not a fiduciary with respect to float practices because it made distributions in accordance with the timetable set out in the governing documents, and, because the trust agreements

[9] The court did not specifically address the fiduciary status of the other two Fidelity entities. As set forth in the complaint, the fiduciary status of FIIOC, which is alleged to be acting wholly as an agent of Fidelity Trust, is derivative of the fiduciary status of Fidelity Trust. The fiduciary status of FMRC, on the other hand, appears to turn on whether the proceeds of the mutual fund shares are plan assets while in the float accounts. App. 23-24 (¶¶ 28-29).

did not say anything about float income; the court determined that such income was therefore beyond the scope of Fidelity's fiduciary duties. Add. 15. This makes no sense and, in fact, turns the DOL's disclosure requirements on their head by saying that, if a fiduciary does not disclose in its governing agreements that it is administering a plan in a disloyal or self-serving way, it may do so. Cf. Mogel, 547 F.3d at 26 (UNUM's contention that it was not acting as a fiduciary with regard to interest it earned on retained asset account that it did not disclose "rests on quicksand").

Thus, the Secretary fundamentally disagrees with the district court's conclusion that the onus was on the participants to negotiate for a different float arrangement. The DOL's float guidance specifically and correctly places that responsibility with the fiduciaries and service providers to disclose float, and the allegation in this case is that the plan sponsor and participants were never in a position to negotiate float because it was never disclosed.

CONCLUSION

For the foregoing reasons, the Secretary respectfully requests that the Court reverse the decision of the district court dismissing the case.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32A

I hereby certify that this brief complies with Federal Rule of Appellate Procedure 32(a)(7)(B). It has a total of 6999 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6). It has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman font size 14.

Dated: September 21, 2015

s/ David Ellis
David Ellis
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CERTIFICATE OF SERVICE

I hereby certify on this 21st day of September, 2015, I electronically filed the foregoing amicus curiae brief with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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